STATE OF UTAH, BOARD OF INDIAN AFFAIRS

and DIVISION OF INDIAN AFFAIRS

v.

NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-49-A Decided March 31, 1992

Appeal from a determination that the State of Utah is not entitled to receive 37-1/2 percent of the owner's portion of proceeds under a Navajo tribal oil and gas operating agreement.

Affirmed.

1. Indians: Generally--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Statutory Construction: Indians

   In a case where the interests of an Indian tribe are arguably in conflict with the interests of some members of the tribe, the Board of Indian Appeals declines to invoke the canon regarding construction of statutory ambiguities in favor of Indians.

2. Indians: Generally--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Statutory Construction: Indians

   Where a statute concerning Indians manifests two competing purposes, an expansive reading of the statute should be avoided if that reading would disserve one of the two purposes.

3. Indians: Mineral Resources: Oil and Gas: Tribal Lands--Indians: Taxation--Statutory Construction: Indians

By analogy to the canon that a state may tax Indians only when congressional consent to such taxation is unmistakably clear, the Board of Indian Appeals finds that a state may share in the oil and gas royalties from tribal property only when Congress has given its unequivocal consent.

4. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Tribal Lands--Statutory Construction: Indians

In determining whether an instrument is a tribal lease for purposes of a particular Federal statute, the critical inquiry is whether it has the characteristics Congress had in mind when employing the term "tribal lease" in the statute.

APPEARANCES: Paula K. Smith, Esq., Salt Lake City, Utah, for appellants; Thomas O'Hare, Esq., Window Rock, Arizona, for the Area Director; Herb Yazzie, Esq., Window Rock, Arizona, for the Navajo Nation; Alan L. Sullivan, Esq., and Phillip Wm. Lear, Esq., Salt Lake City, Utah, and Daniel P. Neelon, Esq., San Antonio, Texas, for Chuska Energy Company.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Two agencies of the State of Utah, its Board of Indian Affairs and Division of Indian Affairs (appellants), 1/ seek review of two decisions, dated January 15 and January 17, 1991, of the Navajo Area Director, Bureau

1/ After this appeal was filed, the Utah Board of Indian Affairs was abolished and its duties assumed by the Utah Division of Indian Affairs and the newly created Utah Dineh Committee. See Appellants' June 3, 1991, notice to the Board. The term "appellants," as used in this opinion, refers to both the original appellants and their successors in interest.

of Indian Affairs (Area Director; BIA), holding that the State of Utah is not entitled, under a 1933 statute, to receive 37-1/2 percent of the owner's portion of proceeds from an operating agreement between the Navajo Nation (Nation) and Chuska Energy Company (Chuska). Appellants state that they are appealing on their own behalf and on behalf of Navajos residing in San Juan County, Utah.

For the reasons discussed below, the Board affirms the Area Director's decisions.

Background

By the Act of March 1, 1933, 47 Stat. 1418, Congress added two tracts of land in Utah to the Navajo Indian Reservation. These were the "Paiute Strip," an area of approximately 500,000 acres, and the "Aneth Extension," an area of approximately 52,000 acres. The Act provided, inter alia:

> Should oil or gas be produced in paying quantities within the lands hereby added to the Navajo Reservation, 37 1/2 per centum of the net royalties accruing therefrom derived from tribal leases shall be paid to the State of Utah: Provided, That said 37 1/2 per centum of said royalties shall be expended by the State of Utah in the tuition of Indian children in white schools and/or in the building or maintenance of roads across the lands described in section 1 hereof, or for the benefit of the Indians residing therein.

Oil production began on the Aneth Extension during the 1950's. Apparently, at least until recently, Utah has received royalties on a regular basis. See Sakezzie v. Utah Indian Affairs Commission (Sakezzie I), 198 F. Supp. 218 (D. Utah 1961), and Sakezzie v. Utah Indian Affairs Commission

(Sakezzie II), 215 F. Supp. 12 (D. Utah 1963), for the early history of the royalty provision and its administration.

In 1968, the above-quoted provision of the 1933 Act was amended to require Utah to expend its portion of royalties "for the health, education, and general welfare of the Navajo Indians residing in San Juan County." The amendment further provided:

> Planning for such expenditures shall be done in cooperation with the appropriate departments, bureaus, commissions, divisions, and agencies of the United States, the State of Utah, the county of San Juan in Utah, and the Navajo Tribe insofar as it is reasonably practicable, to accomplish the objects and purposes of this Act. Contribution may be made to projects and facilities within said area that are not exclusively for the benefit of the beneficiaries hereunder in proportion to the benefits to be received therefrom by said beneficiaries, as may be determined by the State of Utah through its duly authorized officers, commissions, or agencies. An annual report of its accounts, operations, and recommendations concerning the funds received hereunder shall be made by the State of Utah * * * to the Secretary of the Interior and to the Area Director of the Bureau of Indian Affairs for the information of said beneficiaries.

Act of May 17, 1968, 82 Stat. 121.

In 1982, Congress enacted the Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2101-2108 (1988), 2/ which provides:

> Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement * * *

2/ All further references to the United States Code are to the 1988 edition.

> providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources * * * in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.

25 U.S.C. § 2102.

On February 18, 1987, the Nation entered into an oil and gas operating agreement with Chuska, under authority of IMDA. 3/ The Area Director approved the agreement on July 20, 1987. Under the agreement, Chuska was authorized to conduct oil and gas operations on up to 50,000 acres of tribal land to be designated by Chuska from a total of 254,000 acres in Arizona, New Mexico, and Utah.

Oil is now being produced under the operating agreement. At least some of the production is from the Aneth Extension area. On November 6, 1990, the Director of the Utah Division of Indian Affairs (Utah Director) wrote to the Navajo Area Office, BIA, stating:

> Each quarter the Utah Division of Indian Affairs receives an oil royalty check from the BIA in an amount which exceeds $250,000. However, no accompanying statement is included to indicate how the oil royalty payment was calculated. I am requesting that your office include its calculations along with the check, so that I have an idea of how many barrels of oil [were] taken during that quarter. * * * I would like to receive copies of [Minerals Management Service] Forms 2014 and 3160 which will be used to calculate the next royalty payment.

3/ The agreement is identified as No. NO-G-8707-1116 (Chuska III). The same parties entered into two prior operating agreements: one dated July 28, 1983, and approved on Aug. 26, 1983; the other dated Nov. 26, 1984, and approved on May 22, 1985. The latter agreement has expired.

> Secondly, I would like information on the oil production activities of [Chuska] on the Aneth Extension. * * * It is my understanding that the Tribe entered into leases with Chuska under the Indian Mineral Development Act of 1982 and has been making royalty payments to the Navajo Tribe [sic]. If that is the case, then I would think that the Utah Navajos are entitled to 37 1/2% of the royalty which Chuska pays to the Tribe.

Following a meeting with Area Office personnel, the Utah Director wrote to the Field Solicitor, Window Rock, demanding "a full accounting of the amount of oil and natural gas taken by [Chuska] from the Aneth Oil Field since the commencement of their operations" and also demanding payment of 37-1/2 percent of the royalties on that production (Utah Director's Nov. 27, 1990, Letter) .

On January 15 and 17, 1991, 4/ the Area Director wrote to the Utah Director, stating:

> You have requested information from our office concerning the 37-1/2 percent oil royalty paid from Navajo Tribal leases to the State of Utah on behalf of Navajo Indians residing in the Aneth extension area of San Juan County, Utah.
>
> We do not receive copies of the Forms 2014 and 3160 that are filed by oil companies with the Minerals Management Service. The information contained on these forms is received via MMS funds distribution and production reports, which are received on a monthly basis (sample copies are enclosed).
>
> The 37-1/2 percent of oil royalties paid to the State of Utah is calculated on the income from identified leases, which MMS deposits into the U.S. Treasury on behalf of the Navajo Tribe of Indians.
>
> You have further requested information on Chuska Energy Company's oil production within the Aneth extension oil field, which are conducted under an Operating Agreement approved July 20, 1987. * * *

4/ The two letters appear to be identical.

> We have reviewed the operating agreement to determine whether the [Utah Navajo Oil Royalty Trust] Fund is entitled to 37-1/2 percent of a royalty paid to the Navajo Nation by Chuska. In our opinion, the Agreement is an operating agreement under the provision of 25 U.S.C. 2102. We find that the Operating Agreement creates a principal-agent relationship between the Navajo Nation and Chuska * * *. A principal-agent relationship is not an element of a lessor-lessee relationship. The Operating Agreement is not a lease. It should be noted that 25 U.S.C. 2102 lists operating agreements and lease agreements as two distinct agreements among others that may be entered into by a tribe. The Navajo Nation chose an Operating Agreement, not a lease agreement.
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> Based on the above findings, I have concluded that the Operating Agreement in question is not a lease. The statute in question specifically refers to tribal leases. Since the Chuska Operating Agreement is not a lease, 37-1/2 percent of the Tribe's royalty from the Operating Agreement need not be paid to the State of Utah for the benefit of the Fund.

The Area Director informed the Utah Director of Utah's right to appeal his conclusion to this Board. The Board received appellants' notice of appeal on February 19, 1991. Briefs have been filed by appellants, the Area Director, the Nation, and Chuska. In addition, numerous motions and other filings have been made by the parties.

Motion for Stay of Proceedings

On September 13, 1991, after briefing was completed in this appeal, appellants filed a claim in the United States Claims Court, seeking damages for its failure to receive royalties under, inter alia, the operating agreement at issue in this appeal. State of Utah v. United States, No. 91-1428L, U.S. Claims Court. 5/ Subsequently, appellants moved for

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5/ Other pending proceedings have a peripheral relation to this appeal. In June 1991, the Nation filed suit against the State of Utah in Federal

a stay of proceedings before this Board pending final resolution of their claim in the Claims C Court. Appellants contend that the Board cannot grant it the relief it seeks and that a stay "will allow all issues surrounding three [Chuska/Nation] mineral agreements to be resolved in the Claims Court, a forum that is able to award [appellants] the monetary relief they have requested" (Appellants' Sept. 18, 1991, Motion at 2). They state that they seek "a stay and not dismissal in order to prevent starting over should the Claims Court deny jurisdiction over some aspect of the present appeal." Id. at 8.

The Area Director, the Nation, and Chuska oppose appellants' motion.

The Board sees no benefit in staying proceedings at this point. The parties' briefs have all been filed. If the Claims Court finds that it has jurisdiction over appellants' claim, its consideration of the matter will presumably benefit from a final agency decision on the underlying issue. Appellants' motion for a stay of proceedings is denied.

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fn. 5 (continued)
district court, challenging state taxation of oil and gas production from tribal land in San Juan County. Navajo Nation v. State of Utah, Civ. No. 91-C-670J (D. Utah). Chuska has filed a complaint in intervention in that litigation. In addition, state administrative proceedings have been initiated with respect to property and severance taxation of the same production. Chuska Energy Co., Case Nos. 91-1235 and 91-1256, Utah State Tax Commission. Appellants state that they are seeking coordinated discovery in all these proceedings and believe that the Claims Court can provide for such coordination. Appellants have also filed a motion for discovery in this appeal and ask the Board to order coordinated discovery if it declines to stay proceedings.

Discussion and Conclusions

Despite the voluminous filings in this appeal, the issues raised by appellants may be simply framed: (1) Does the 37-1/2-percent royalty provision in the 1933 Act apply to non-lease agreements? and (2) is the 1987 operating agreement actually a lease despite its title? The first issue is a matter of construction of the 1933 Act; the second a matter of construction of the operating agreement.

The 1933 Act provides that "37-1/2 per centum of the net royalties accruing [from oil and gas production] derived from tribal leases shall be paid to the State of Utah." Appellants contend that "tribal leases" must be construed to include non-lease agreements because the relevant rules of statutory construction require this result. Further, relying upon their analysis of the Act's legislative history, they contend that Congress intended Utah to receive 37-1/2 percent of all tribal oil and gas revenues from the lands subject to the 1933 Act.

This latter contention proposes an especially broad construction of the 1933 royalty provision--a construction which would apparently encompass, not only tribal proceeds derived from leases or other agreements, but also tribal oil and gas revenues derived in any other manner. In support of this construction, appellants point to a statement appearing in the House and Senate reports on the 1933 Act, in which it is indicated that "[provision is made for disposition of any revenue arising from any oil and gas which might be discovered in the area." H.R. Rep. No. 1883, 72d Cong., 2d Sess. 2 (1933); S. Rep. No. 1199, 72d Cong., 2d Sess. 2 (1933) (emphasis added).

Also in support of this construction, appellants contend that, in 1933, leasing was the only way in which oil and gas revenues could be produced from tribal lands. Therefore, appellants reason, Congress assumed that its statutory language would encompass all oil and gas revenues from tribal lands; ergo, Congress intended that 37-1/2 percent of all tribal oil and gas revenues from the subject lands would go to Utah.

The legislative history is not particularly helpful on this point. In fact, it is generally unhelpful with regard to the issues raised in this appeal. Appellants' reliance on the quoted statement is strained. At best, the statement is ambiguous. It simply declares that provision is made for disposition of "any revenue," not that appellants were to receive a portion of "any revenue."

There are also a number of other problems with appellants' broad interpretation. First, it renders the statutory phrase "derived from tribal leases" surplusage, a result generally looked upon with disfavor. E.g., In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1362 (D.C. Cir. 1980); 2A N. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992).

Second, under appellants' construction, Utah would apparently be entitled to receive 37-1/2 percent of the Nation's revenues from taxes it imposes on oil and gas production, as these surely fall within the scope of "any revenue" from such production. Further, if the Nation were to decide to become its own producer, appellants' reading would entitle Utah to 37-1/2 percent of the producer's portion of revenues as well as

37-1/2 percent of the owner's portion. Appellants do not address these seemingly indisputable consequences of their "any revenue" construction. Yet these consequences are so extreme that Congress should not be deemed to have intended them without at least some evidence of such an intent.

Third, it is not entirely accurate to state that leasing was the only vehicle available in 1933 for oil and gas development of tribal lands. Although there were undoubtedly many practical reasons why an Indian tribe would not have chosen to produce its own oil and gas, there was no legal reason why it could not have done so. Further, there existed in 1933 a statutory provision concerning service contracts relating to Indian lands. This provision derived from an 1871 statute and is presently codified at 25 U.S.C. § 81. 6/ Although it was not employed as authority for oil and gas service contracts until the 1970's, see discussion below, it was on the statute books in 1933.

Especially in light of several well-established principles governing interpretation of Indian statutes, discussed below, the Board cannot attribute to Congress in 1933 an intent to assign to Utah 37-1/2 percent of all tribal oil and gas revenues from the lands subject to the Act. Even without the assistance of these principles, the Board would reject

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6/ 25 U.S.C. § 81 provides in part:

"No agreement shall be made by any person with any tribe of Indians* * * for the payment or delivery of any money or other thing of value * * * in consideration of services for said Indians relative to their lands * * * unless such contract be executed and approved as follows: * * * It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it."

appellants' broad construction because it simply does too much violence to the plain language of the statute.

The remainder of appellants' statutory construction arguments appear aimed at a slightly narrower construction, i.e., one in which the term "tribal leases" is read to include other kinds of agreements. This construction is narrower in the sense that tribal tax revenues and self-production revenues would presumably not be included.

[1] In support of this construction, appellants first contend that they, on behalf of the San Juan County Navajos, are entitled to the benefit of the canon which requires that statutes be construed liberally in favor of Indians and that ambiguities be resolved to the Indians' benefit. The canon must be invoked in their favor, appellants contend, because the 1933 Act requires that they administer the royalty fund for the benefit of the San Juan County Navajos.

Chuska argues that the canon, if applicable, must be invoked in favor of the Nation. The Nation argues that the canon is not applicable here because the dispute involves the interests of the Nation vis-a-vis the interests of some members of the Nation. In support of its position, the Nation cites Northern Cheyenne Tribe v. Hollowbreast, 425 U.S. 649, 655 n.7 (1976), in which the Supreme Court found that "this eminently sound and vital canon has no application [because] the contesting parties are an Indian tribe and a class of individuals consisting primarily of tribal

members." Both Chuska and the Nation also argue that there is actually no need to call upon the canon at all because there is no ambiguity in the 1933 Act.

The Board considers whether the canon is properly invoked here and, if so, in whose favor.

On its face, the term "tribal leases" appears clear enough. Indeed, appellants appear to be seeking to create an ambiguity rather than to resolve one. The Supreme Court has stated that "[t]he canon does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) (citation omitted).

More recently, however, the Court has indicated that a statutory term may be clear as to one effect and ambiguous as to another. In County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 112 S. Ct. 683 (1992), the Court construed language in a 1906 amendment to the General Allotment Act, which provided that, after issuance of a fee patent for an allotment, "all restrictions as to sale, encumbrance, or taxation of said land shall be removed." 25 U.S.C. § 349. The Court held that this language manifested a clear intent to authorize real property taxation of fee patented land but was ambiguous with respect to excise taxation of the sale of land. The Court stated:

> When we are faced with these two possible constructions [i.e., either authorizing or not authorizing excise taxation], our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed

> liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." * * *
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> The short of the matter is that the General Allotment Act explicitly authorizes only "taxation of . . . land," not "taxation with respect to land," taxation of transactions involving land," or "taxation based on the value of land." Because it is eminently reasonable to interpret that language as not including a tax upon the sale of real estate, our cases require us to apply that interpretation for the benefit of the Tribe. [Citations omitted.]

112 S. Ct. at 693-94.

The royalty provision in the 1933 Act is subject to a similar analysis. The provision is clear in that it unmistakably authorizes payment of 37-1/2 percent of royalties from tribal leases to the State of Utah. At the same time, it is arguably ambiguous as to whether other kinds of agreements may be encompassed within the term "tribal leases." If the term is ambiguous, however, a further determination must also be made. Are appellants, on behalf of the San Juan County Navajos, entitled to the benefit of the ambiguity? Is the Nation? Or, in light of Hollowbreast, should the canon be disregarded even if there is an ambiguity?

As noted above, appellants argue that the canon must be invoked on behalf of the San Juan County Navajos because the royalty provision was enacted for their benefit. The cases relied upon by appellants, Sakezzie I and Sakezzie II, supra, indicate that Aneth Extension Indians were entitled, vis-a-vis appellants, to the benefit of ambiguities in the 1933 Act. 7/

7/ Sakezzie was a suit brought against Utah by Navajos residing in the Aneth Extension area, concerning expenditures from the 37-1/2 percent royalty fund under the 1933 Act. The Court found, inter alia, that the

However, the context in which appellants seek to apply the canon here is clearly not analogous to that in Sakezzie; the fact that the canon may be invoked against a state or other non-Indian party does not stand for the proposition that it may also be invoked against an Indian tribe.

Further, whatever benefits the San Juan County Navajos are entitled to receive under the 1933 Act, a Supreme Court decision subsequent to Sakezzie has made it clear, if there were any doubt, that the principal beneficiary of the Act is the Nation. In United States v. Jim, 409 U.S. 80 (1972), the Supreme Court addressed a challenge to the 1968 amendment brought by the Indian residents of the Aneth Extension. The Aneth residents claimed that the 1968 amendment deprived them of vested rights because it enlarged the class of Indians for whom expenditures could be made from the 37-1/2-percent royalty fund. The Court rejected their argument, stating:

> Congress in 1933 did not create constitutionally protected property rights in the appellees [i.e., the Aneth residents]. The Aneth Extension was added to a tribal reservation, and the leases which give rise to mineral royalties are tribal leases. It is settled that "[w]hatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for common use and equal benefit of all the members." * * * To be sure, the 1933 Act established a pattern of distribution which benefited the appellees more than other Indians on the Navajo Reservation. But it was well within the power of Congress to alter that distribution scheme. 3/
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> 3/ We intimate no view as to the rights a tribe might have if Congress were to deprive it of the value of mineral royalties

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fn. 7 (continued)
narrow construction of the term "tuition" urged by Utah, i.e., enrollment charges only, should be rejected in favor of a construction which included transportation and room and board. In reaching this conclusion, the court relied in part on the canon requiring construction of ambiguous provisions in favor of Indians. Sakezzie II, 215 F. Supp. at 17.

generated by tribal lands. [Citations and footnote omitted; emphasis in original.]

409 U.S. at 82.

Not only did the 1933 Act vest property rights in the Nation, it also enlarged the Nation's governmental jurisdiction. Accordingly, the Nation, both as property owner and sovereign, would clearly appear to be an appropriate beneficiary of the canon in this case. As evident in some of the many formulations of the canon, protection of tribal sovereignty is one of the reasons for its existence. See, e.g., White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980): "Ambiguities in federal law have been construed generously in order to comport with * * * traditional notions of sovereignty and with the federal policy of encouraging tribal independence."

The fact remains, however, that the San Juan County Navajos have an interest in the royalty provision. They are likely to lose some service if the funds go to the Nation, given the Nation's law and policy that revenues from tribal property are held in common for all tribal members. 8/ See Nation's Brief at 2. In light of Hollowbreast, the Board will not apply the canon here.

Even though this often-cited canon will be set aside in this case, ample guidance is available from the body of Indian law developed in the

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8/ The 1987 operating agreement allocates 2 percent of the Nation's share of gross proceeds to the Nation's Chapters affected by operations under the agreement. Paragraph 15(a).

Supreme Court's many decisions in the area. Indeed, the principles derived from those decisions must govern the outcome here.

[2] The Nation cites Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). In that case, the Court construed the Indian Civil Rights Act of 1968 (ICRA). It observed: "Two distinct and competing purposes are manifest in the provisions of the ICRA: In addition to its objective of strengthening the position of individual tribal members vis-a-vis the tribe, Congress also intended to promote the well-established federal 'policy of furthering Indian self-government.'" 436 U.S. at 62. The Court found that reading Federal remedies for civil rights violations into the ICRA, while serving the first purpose, "plainly would be at odds with the congressional goal of protecting tribal self-government." Id. at 64. Stating further that "[w]here Congress seeks to promote dual objectives in a single statute, courts must be more than usually hesitant to infer from its silence a cause of action that, while serving one legislative purpose, will disserve the other," id., the Court declined to read Federal remedies into the statute.

The 1933 Act presents a clear parallel to the ICRA in that it manifests two competing purposes: to enlarge the Nation's property and governmental base, thus promoting the Nation's self-government; and to give the San Juan County Navajos rights to special services from some of the income that would otherwise have gone to the Nation. Clearly, the interpretation urged by appellants will disserve the first purpose, although it will serve the second. Martinez teaches that, in such a case, the words of the statute

should not be expanded beyond their clear meaning, particularly where to do so would result in an intrusion upon tribal self-government.

In Martinez, the Supreme Court recognized and gave effect to the longstanding Federal policy of fostering tribal self-government. Other authorities demonstrate that this policy is based upon, inter alia, a belief that tribal governments, rather than the Federal Government or state governments, are the entities best able to make governmental decisions affecting tribal members and best able to provide the services necessary to tribal members' well-being. E.g., Indian Self-Determination Act of 1975, as amended, 25 U.S.C. §§ 450-450n; President Reagan's January 24, 1983, Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. 98; 9/ Indian child Welfare Act, 25 U.S.C. §§ 1901-1963; Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 44-45 (1989). While this policy, in itself, cannot dictate the outcome here, it is a "backdrop" against which the issues must be addressed. E.g., Bracker, supra, 448 U.S. at 143: "[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' against which vague or ambiguous federal enactments must always be measured." (Citation omitted.) See also Martinez, 436 U.S. at 60.

[3] A line of cases with clear parallels to the present appeal is the one dealing with state taxation of Indians. To be sure, state taxation, per se, is not involved here. Yet, the effect of the royalty provision is much

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9/ President Reagan's policy statement was reaffirmed by President Bush on June 14, 1991, 27 Weekly Comp. Pres. Doc. 783.

the same as a tax--Utah is given the right to a portion of the revenues from the Nation's land, revenues which would otherwise go to the Nation. 10/ Indeed, the high percentage of Utah's share makes the royalty provision a greater burden upon the Nation than most taxes would probably be. 11/

In County of Yakima 112 S. Ct. at 688, the Supreme Court stated: "[O]ur cases reveal a consistent practice of declining to find that Congress has authorized state taxation unless it has 'made its intention to do so unmistakably clear.' Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985); see also California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n. 17 (1987)." This line of cases favors narrow construction of any congressional authorization to tax and, by analogy, of any other statutory provision with a similar effect. With respect to the 1933 Act, these cases counsel rejection of appellants' expanded construction of the term "tribal

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10/ Historically, royalty-sharing provisions and taxing authorizations have been viewed as alternative methods of accomplishing the same thing--allowing the states to receive revenue from public or Indian lands. The 1920 Mineral Leasing Act, governing leasing on public lands, contained a provision assigning 37-1/2 percent of bonuses, royalties, and rentals to the affected states "to be used * * * for the construction and maintenance of public roads or for the support of public schools or other public educational institutions." Act of Feb. 25, 1920, § 35, 41 Stat. 437, 450. Similar provisions were considered for inclusion in a 1927 statute concerning Executive Order Indian reservations, Act of Mar. 3, 1927, 25 U.S.C. §§398a-398e, but were ultimately rejected in favor of a provision authorizing state taxation. See Cotton Petroleum v. New Mexico, 490 U.S. 163, 180-81 n.12 (1989). See also L. Kelly, The Navajo Indians and Federal Indian Policy 48-103 (1968) (Appendix A, Exhibit 2, to appellants' opening brief); J. R. Alley, The 1933 Addition to the Navajo Reservation in Utah (1989) (Exhibit B to the Nation's brief).

11/ Cf. Cotton Petroleum Corp. v. New Mexico, 490 U.S. at 186-87 n.17, and accompanying text (distinguishing its holding--that states were not preempted from taxing oil producers operating on tribal lands--from the different result in Montana v. Crow Tribe of Indians, 484 U.S. 997 (1988), on the basis that the latter case involved unusually high taxes, i.e., 32.9 percent).

leases" in favor of a construction limited to the clear and unmistakable meaning of the term.

Another factor that must be taken into account here, in order to arrive at the proper construction of the term "tribal leases," is the relation between the 1933 Act and IMDA. Appellants argue that IMDA could not have changed its right to receive royalties without an express statement to that effect. They argue further that the only way the 1933 Act and IMDA can be harmonized is to construe the royalty provision in the 1933 Act as applicable to any kind of agreement entered into under IMDA.

The Board cannot agree that this is the only way the two statutes may be read in harmony. The most obvious way to do so would be to recognize that the 1933 royalty provision continues to apply to leases, whether entered into under IMDA or under earlier statutory authority, but does not apply to agreements in other forms. 12/ This construction does the least violence to the statutes. It recognizes that the 1933 royalty provision was not impliedly repealed by IMDA but also that its reach was not impliedly

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12/ IMDA authorizes tribes to enter into leases as well as many other forms of agreement.

Several statutes authorizing tribal mineral leases were enacted prior to IMDA. The first general authorization was the Act of Feb. 28, 1891, 25 U.S.C. § 397, which authorized leasing of tribal lands for mining purposes for periods not to exceed 10 years. The 1891 Act was amended by the Act of May 29, 1924, 25 U.S.C. § 398, which authorized leasing of tribal lands "for oil and gas mining purposes for a period of not to exceed ten years, and as much longer as oil and gas shall be found in paying quantities." A 1927 statute authorized oil and gas leasing on Executive Order reservations, in accordance with 1924 Act. 25 U.S.C. §§ 398a-398e. In 1938, Congress enacted the comprehensive Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396f, authorizing mineral leasing of tribal lands “for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.”

expanded by IMDA. Further, it recognizes that the term "lease" has the same meaning in both statutes. Clearly, in IMDA, where the term "lease" is included in a list of several forms of agreement, Congress did not intend that "lease" would incorporate all the other forms.

If any doubt remains as to the proper relation of these two statutes, the Supreme Court's decision in Montana v. Blackfeet Tribe, supra, is helpful in resolving it. In that case, the Court held that tribal royalties from leases entered into under the 1938 Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396f, could not be taxed by states, despite taxing permission given in a 1924 statute, 25 U.S.C. § 398. The 1938 Act was silent regarding taxation, just as IMDA is silent regarding the royalty provision in the 1933 Act.

In Blackfeet Tribe, Montana made arguments similar to those made by appellants here. The Court rejected them:

> [Montana] argues that nothing in the 1938 Act is inconsistent with the 1924 taxing provision and thus that the provision was not repealed by the 1938 Act. * * * The State also notes that there is a strong presumption against repeals by implication * * * especially an implied repeal of a specific statute by a general one. * * * Thus, in the State's view, sound principles of statutory construction lead to the conclusion that its taxing authority under the 1924 Act remains intact.
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> The State fails to appreciate, however, that the standard principles of statutory construction do not have their usual force in cases involving Indian law. As we said earlier this Term, "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." * * * Two such canons are directly applicable in this case: first, the States may tax Indians only when Congress has manifested clearly its consent to such taxation * * * second, statutes are to be construed liberally

> in favor of the Indians, with ambiguous provisions interpreted to their benefit. [Citations omitted.]

471 U.S. at 765-66. Relying in part on the canons cited, the Court held that "if the tax proviso [in the 1924 Act] survives at all, it reaches only those leases executed under the 1891 Act [, 25 U.S.C. § 397,] or its 1924 amendment." 471 U.S. at 768. Here, the parties agree that the 1933 royalty provision was not repealed by IMDA and that it continues to apply to leases, even leases entered into under IMDA. Blackfeet Tribe teaches, however, that the provision should not be read into IMDA with the expanded application sought by appellants. 13/

The Board holds, for all the reasons discussed, that the royalty provision in the 1933 Act may not be expanded, beyond its clear language, to include non-lease agreements entered into under IMDA.

Appellants' second argument is that the 1987 operating agreement between the Nation and Chuska is actually a lease although not so termed. Appellants identify a number of elements which they contend are typical lease provisions and argue that, because the operating agreement contains

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13/ See also 25 U.S.C. § 2105, which provides: "Nothing in [IMDA] shall affect, nor shall any Minerals Agreement approved pursuant to [IMDA] be subject to or limited by, [the 1938 Indian Mineral Leasing Act], or any other law authorizing the development or disposition of the mineral resources of an Indian or Indian tribe." While the 1933 Act does not authorize development of mineral resources, it clearly authorizes disposition of proceeds from development and therefore presumably falls within the scope of this provision. The sense of the provision is the same as the conclusion reached by the Board under the Blackfeet Tribe analysis--the 1933 royalty provision is not affected by IMDA but also does not limit non-lease agreements entered into under IMDA.

such provisions, even though it also contains provisions typical of other kinds of agreements, it must be considered a lease. Appellants rely primarily on a California case, Los Angeles v. Continental Corp., 113 Cal. App. 2d 207, 248 P.2d 157 (1952), in which a "Drilling and Operating Agreement" was found to be a lease for purposes of California tax law. Appellants further contend that the Nation and Chuska have treated the operating agreement as a lease. In order to prove their allegations in this regard, they seek extensive discovery.

Chuska contends that various kinds of oil and gas agreements may well have similar provisions because they are intended to accomplish similar purposes. It contends, however, that the one fundamental distinction between a lease and an operating agreement is that "a mineral lease necessarily involves an actual conveyance of a working interest in minerals, whereas an operating agreement does not" (Chuska's Brief at 51) (emphasis in original). Chuska also identifies several provisions of the agreement which it contends distinguish the agreement from a lease.

The parties cite extensively from state and Federal law developed in a non-Indian context. While such sources are useful as guidance, it is Federal Indian law which controls where issues concerning Indian trust property are concerned. See, e.g. Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, 21 IBIA 88, 96, 98 I.D. 419, 423-24 (1991); Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 323-31, 97 I.D. 215, 219-23 (1990).

[4] The relevant Federal Indian law necessarily includes the 1933 Act. Cf. 1 H. Williams and C. Meyers, Oil and Gas Law § 207 (1991): "[W]hen the question in issue is whether an instrument is a 'lease' as such term is used in a particular statute * * * the question ultimately is whether the instrument in question has the characteristics which the legislature had in mind in employing the word 'lease' in the statute." Thus, the inquiry here bears some similarity to the one above, in the sense that congressional intent must be ascertained. Here, it must be determined whether the operating agreement is a lease of Indian land as Congress understood that term in 1933.

In 1933, leases of Indian lands had long been recognized as conveyances, having been explicitly so defined by Congress. See 25 U.S.C. § 177, derived from the Indian Non-Intercourse Act of 1834: "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." (Emphasis added.) None of the statutes authorizing mineral leasing of tribal lands (see footnote 12, supra) expressed any intent to alter the Non-Intercourse Act concept of a lease as a conveyance. Further, as appellants concede, mineral leasing of Indian lands followed a traditional pattern in the 1930's; it was not until much later that creative kinds of mineral development agreements began to be employed. Thus, it seems beyond dispute that Congress had traditional tribal leases in mind, leases in which a conveyance was effected, when it employed the term "tribal leases" in the 1933 statute.

Appellants argue that IMDA blurs the distinction between leases and other mineral agreements. IMDA clearly does so for purposes of IMDA itself. For a few years prior to enactment of IMDA, the Department of the Interior reviewed and approved tribal non-lease mineral agreements under 25 U.S.C. § 81, while continuing to approve leases under the 1938 Indian Mineral Leasing Act. The Department supported enactment of IMDA, among other reasons, because it would remove the necessity for making a determination as to whether a particular agreement was a lease or a service agreement. 14/ IMDA provides the same review and approval procedures for all agreements entered into under it, including leases. Recently published proposed regulations follow the example of the statute in providing a single review procedure for all IMDA agreements. Proposed 25 CFR Part 225, 56 FR 58734, 58748 (Nov. 21, 1991). A separate procedure is established under the proposed regulations for leasing of tribal lands under the 1938 Act. Proposed 25 CFR Part 211, 56 FR at 58737. 15/

14/ The Department stated, inter alia:

"Since 1975, the Department has approved a number of non-lease ventures involving the development of mineral resources, pursuant to [25 U.S.C. § 81]. * * * [T]he approval procedure for non-lease ventures under section 81 requires a rather cumbersome case-by-case analysis to determine whether the document submitted for approval is a service agreement within the purview of section 81 and does not convey a leasehold interest within the purview of the 1938 Act, or an interest in land within the purview of the Indian Non-Intercourse Act (R.S. 2116; 25 U.S.C. 177). * * * [W]ith the proliferation and hybridization of non-lease ventures, it is increasingly difficult to make the determination described."

S. Rep. No. 472, 97th Cong., 2d Sess. 10 (1982).

15/ The Board confesses some puzzlement over the definition of "lease" in Part 211 of the proposed regulations, concerning tribal leasing under the 1938 Act. The definition, which is not discussed in the preamble, provides: "Lease means any contract, profit-sharing arrangement, joint venture, or other agreement approved by the United States under [the 1938 Act as amended] that authorizes exploration for, extraction of, or removal of any minerals." Proposed 25 CFR 211.3, 56 FR at 58738.

The Board assumes, given the Department's 1982 statement to Congress, that any agreements approved under the 1938 Act would first have been determined to be leases, even though otherwise titled. It is clear from the 1982

The fact that IMDA removes the necessity for distinguishing between leases and other agreements, for purposes of approval under IMDA, however, is of little consequence here because, as noted above, the inquiry here is whether the operating agreement is a lease for purposes of the 1933 Act.

In a number of respects, the 1987 operating agreement is significantly different from the standard mineral lease of tribal land. For instance:

(1) No specific land is described as subject to the agreement. Rather, under Paragraph 5, Chuska is given the right to select up to 50,000 acres from among 254,000 identified acres. Even appellants concede that this provision goes beyond the typical oil and gas lease (Appellants, Opening Brief at 43-44).

(2) Rather than employing the standard lease conveyance language, the agreement provides in Paragraph 4 that the Nation "retains and appoints [Chuska] as the exclusive oil and gas operator for the land," and, in Paragraph 11, that the Nation appoints Chuska as its agent with respect to the sale of oil and gas produced.

(3) Under Paragraph 25, the Nation is vested with “the right to take and market all or any specified portion of the oil produced.” Paragraph 26 vests the Nation with the right of first refusal with respect to gas

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fn. 15 (continued)
statement that, for purposes of the 1938 Act, the Department recognized a distinction between leases and other agreements, based upon whether or not they conveyed a leasehold interest or an interest in land.

produced. Under a standard lease, only the lessee would have the right to market oil.

(4) Under Paragraphs 18-20, an Operating Committee, initially established under the 1983 operating agreement, is given control over development and drilling decisions. For instance, Chuska must obtain prior approval from the committee for development of a drilling block or for drilling of a well. Chuska is also required to submit frequent and comprehensive reports to the Operating Committee. The Operating Committee consists of three members appointed by the Nation, of which one is to be chairman of the committee, and three members appointed by Chuska. See Paragraph 19 of the July 28, 1983, operating agreement.

(5) Under Paragraph 12, the agreement has a primary term of 8 years, at the end of which any drilling block which lacks a producing well must be surrendered. Paragraph 13 provides that the maximum term is 25 years. Standard Indian leases and typical leases in the industry provide for an indefinite secondary term which continues as long as oil or gas is produced in paying quantities. It is conceivable, of course, as appellants argue, that an oil and gas lease could have a finite secondary term, even though such a term is unusual. However, the tribal mineral leasing authority in use in 1933, i.e., 25 U.S.C. § 398, explicitly provided for indefinite secondary terms, as did the later Indian Mineral Leasing Act. See footnote 12, supra.

It is clear that these provisions of the operating agreement vest a substantially greater degree of control in the Nation than is common under

a lease, and especially under the standard form of tribal mineral lease. It is equally clear that the parties did not intend to enter into a traditional lease but, rather, intended to take advantage of the new forms of agreement authorized by IMDA. 16/ Finally, there is no provision in the agreement which unambiguously effects a conveyance. For these reasons, the Board concludes that the 1987 operating agreement is not a lease within the meaning of the 1933 Act.

Appellants make one further argument-- that the 1987 agreement should be construed as a lease because the parties have treated it as a lease. In support of this argument, appellants make allegations which they state they cannot prove at this time but seek to prove through discovery. Appellants allege: (1) the 1987 operating agreement is similar to a 1982 agreement which was rescinded by the Navajo Tribal Council because it was in effect a lease; (2) Chuska pays Navajo production taxes; and (3) the Operating Committee does not actually function as provided in the agreement. 17/

16/ The agreement is one such as Congress envisioned in enacting IMDA. See, e.g., H.R. Rep. No. 746, 97th Cong., 2d Sess. 4 (1982):

"The most serious problem with [the 1938 Act], is that it authorizes development of tribal oil and gas resources only by leasing. This requirement ignores the possibility of joint ventures, joint production agreements, risk service contracts, and other non-lease ventures which are commonly used in mineral development today. Such non-lease ventures can provide the vehicle by which tribes can become directly involved in management decisions. The normal lease arrangement merely turns over responsibility for all development decisions to the lessee."

17/ Appellants also alleged in their opening brief that the Nation's Resources Committee had not been involved in the approval of the 1987 agreement, in violation of tribal law. It is not clear what import this alleged violation of tribal law would have on the issue in this appeal, even if it were shown to have occurred. In any event, appellants' allegation is refuted by a Jan. 28, 1987, resolution of the Resources Committee, which recommended to the Tribal Council that the agreement be approved.

Appellants' first and third allegations are not only speculative but also essentially irrelevant to the issue in this appeal. Appellants have not seen the 1982 agreement and concede that their allegation regarding the agreement's contents is mere conjecture. In any event, the fact that the Tribal Council may have considered this earlier, apparently pre-IMDA, agreement to be a lease has no real bearing upon whether, as a matter of Federal law, the 1987 agreement is a lease. This is true even if, as appellants speculate, there are similarities between the 1982 and 1987 agreements. Appellants' third allegation, i.e., that the Operating Committee does not function, even if proved, would show only that there is a compliance problem with the agreement, not that the agreement is in fact a lease. 18/

There appears to be no question as to the factual accuracy of appellants' second allegation. The Nation asserts in paragraph 25 of its complaint in Navajo Nation v. State of Utah, , that it imposes its possessory interest and severance taxes upon Chuska. Appellants contend that payment of the possessory interest tax, in particular, proves that Chuska is a lessee because the tax is imposed on possessory interests, which are defined as "the property rights under a lease granted by the Navajo Tribe, including the rights to the lease premises and underlying natural resources." 24 Navajo Trib. Code §§ 202, 204(l). It is true that 24 Navajo Trib. Code § 204(3) defines "lease" broadly, to include joint ventures and operating agreements. However, the fact that the

18/ Cf. 25 U.S.C. § 2104(a), concerning approval of agreements in existence at the time IMDA was enacted. This section provides in part: "Such review shall be limited to the terms of the agreement and shall not address questions of the parties, compliance therewith."

Nation has defined "lease" to include operating agreements for tribal tax purposes does not show that the 1987 agreement is a lease for purposes of the 1933 Act.

For the reasons discussed, the Board concludes that the Area Director's decisions should be affirmed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Navajo Area Director's January 15 and January 17, 1991, decisions are affirmed. 19/

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

19/ All remaining motions are hereby denied.